



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 11, 2015

Ms. Holly A. Sherman
Counsel for Klein Independent School District
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2015-09065

Dear Ms. Sherman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 563057.

The Klein Independent School District (the "district"), which you represent, received a request for information pertaining to all retaliation, harassment, intimidation, or discrimination notices, letters, or complaints provided to or filed against the district or related entities or individuals during a specified time period. You state the district has redacted e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You further state the district has redacted student identifying information pursuant to the Family Educational Right and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim the submitted

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office. *See* ORD 684.

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you state some of the requested information may be the subject of previous requests for information that resulted in open records letter rulings. To the extent the requested information was the subject of previous rulings, the district must dispose of any such information in accordance with those rulings, provided there has been no change in the law, facts, and circumstances on which the previous rulings were based. To the extent the requested information is not the subject of a previous ruling, we will address your arguments against disclosure of the information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). Portions of the submitted information, which we have marked, consist of completed evaluations subject to section 552.022(a)(1) of the Government Code and court-filed documents subject to section 552.022(a)(17) of the Government Code. The district must release the completed evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The district must release the court-filed documents pursuant to section 552.022(a)(17) unless they are made

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

confidential under the Act or other law. *See id.* § 552.022(a)(17). Although you raise section 552.103 of the Government Code for this information, this exception is discretionary in nature and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold any of the information subject to section 552.022, which we have marked, under section 552.103. However, because sections 552.101 and 552.117 of the Government Code make information confidential for purposes of section 552.022, we will consider the applicability of these exceptions to the information subject to section 552.022. Further, we will address your arguments against disclosure of the remaining information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). This office has concluded that a “teacher” for purposes of section 21.355 means a person who is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code, and is teaching at the time of the evaluation. *See id.*

You assert the information you have marked consists of written evaluations that are confidential under section 21.355. You inform us the teachers at issue held the appropriate certifications and were teaching at the time of the evaluations. Based on your representations and our review, we find the information subject to section 552.022(a)(1), which we have marked, constitutes evaluations as contemplated by section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have failed to demonstrate how any of the remaining information consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355 of the Education Code. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.103 of the Government Code provides, in pertinent part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You inform us, and provide documentation showing, at the time the district received the present request for information, the district was a party to a pending lawsuit styled *S.A.T. and a/n/f L.T. v. Klein Independent School District Board of Trustees et. al.*, Civil Action No. 4:13-cv-03733, in the United States District Court Southern District of Texas, Houston Division. You explain the requestor filed this lawsuit, which alleges harassment, discrimination, intimidation, and retaliation by the district and its employees. You state the requestor seeks information directly related to the issues identified in the pending lawsuit. Based on your representations and our review, we find the district was a party to pending litigation when it received the present request for information. Further, we find the information at issue relates to the pending litigation. Therefore, the district may generally withhold the information we have marked under section 552.103 of the Government Code.

We note, however, a portion of the information at issue involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see* Open Records Decision No. 127 (1976). This office has stated basic information about a crime may not be withheld under section 552.103 of the Government Code, even if it is related to litigation. Open Records Decision No. 362 (1983). Thus, we find the basic offense information from the incident report at issue may not be withheld on the basis of section 552.103. Basic information refers to the information held to be public

in *Houston Chronicle*, and includes, among other items, an identification and description of the complainant and a detailed description of the offense. *See* 531 S.W.2d at 186-87; ORD 127 (summarizing types of information considered to be basic information). However, we note basic information does not include dates of birth or information related to witnesses or suspects who were not arrested. *See* ORD 127. Therefore, with the exception of basic information, the district may withhold the information we have marked under section 552.103 of the Government Code.⁴

We further note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

We understand the district will redact the information you have marked under section 552.117(a)(1) of the Government Code pursuant to section 552.024(c)(2) of the Government Code.⁵ However, we note the basic information and the information subject to section 552.022(a)(17) contains additional information subject to section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the employees

⁴As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure, except to note section 552.108 of the Government Code does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c).

⁵Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

whose information is at issue timely elected confidentiality under section 552.024, the district must withhold the information you have marked, in addition to the information we have marked, under section 552.117(a)(1) of the Government Code. However, to the extent the employees whose information is at issue did not make timely elections under section 552.024, the district may not withhold the information you have marked and we have marked under section 552.117(a)(1) of the Government Code.

In summary, to the extent the requested information was the subject of previous rulings, the district must dispose of any such information in accordance with those rulings, provided there has been no change in the law, facts, and circumstances on which the previous rulings were based. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of the basic information from the incident report at issue, the district may withhold the information we have marked under section 552.103 of the Government Code. To the extent the employees whose information is at issue timely elected confidentiality under section 552.024 of the Government Code, the district must withhold the information you have marked, in addition to the information we have marked, under section 552.117(a)(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Alley Latham", with a long, sweeping horizontal line extending to the right.

Alley Latham
Assistant Attorney General
Open Records Division

AKL/dls

Ref: ID# 563057

Enc. Submitted documents

c: Requestor
(w/o enclosures)